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Yap Kian @ Yap Sin Tian (suing as Chairman of the United Chinese Schools Committees' Association Malaysia (Dong Zong) and members of the Community Centre, apart from named defendants) v Poh Chin Chuan & Ors

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-87–01 OF 2015

C VAZEER ALAM MYDIN J

24 JUNE 2015

Civil Procedure — Res judicata — Judgment — Unincorporated associations D *— Application to restrain and prevent convening of meeting — Allegation that agenda was unlawful — Parties entered into consent order — Failure to adhere to terms of consent order — Defendants filed enclosure seeking various declaratory orders and injunctive relief but was dismissed — Defendants filed another enclosure seeking various declaratory and injunctive relief — Enclosure very* E *similar to earlier enclosure — Whether subject matter in enclosure had been disposed of — Whether res judicata applied — Whether court was functus officio*

The plaintiff filed this originating summons to restrain and prevent the defendants from convening a meeting of the Central Committee of the United F Chinese School Committees' Association Malaysia ('Dong Zong') which was scheduled to be held on 20 January 2015. The plaintiff contended that the convening of the meeting by the first defendant was in contravention of Dong Zong's Constitution, and the agenda was unlawful. The defendants had not filed any affidavits in reply and therefore, the parties agreed to an interim G measure and understanding which led to the recording of a consent order. With the consent order in place, the only issue for whether the central committee ('CC') could in law dissolve the existing Central Executive Committee of Dong Zong ('CEC') and re-elect a new CEC before the expiry of its constitutional term of four years. The defendants complained that the plaintiff H had failed to adhere to the terms of the consent order and the defendants then filed encl 33 seeking various declaratory orders and injunctive relief. Enclosure 33 was dismissed. The defendants filed encl 45 seeking various declaratory and injunctive relief against the plaintiff, which were very similar in terms to that sought in encl 33. The defendants main argument is that there is I non-compliance of these two court orders by the plaintiff, and as such the additional declaratory orders and injunctions are necessary. The plaintiff however argued that the matters contained in encl 45 and the reliefs sought therein were beyond the powers or jurisdiction of this court on the following grounds, namely that the provisions of the Societies Act places such powers on

the registrar and not the courts; the doctrine of res judicata would apply as similar relief had been sought by the defendants in encl 33, that was dismissed by the court; and the court was functus officio as the subject matter of the originating summons had been disposed of.

Held:

(1) The CEC did not enjoy security of tenure for the full term of four years. The proposed agenda in the notice of meeting was valid and proper in law. The plaintiff was ordered to convene a meeting of the CC within 21 days of the order by issuing the appropriate notice in accordance to Dong Zong's Constitution which shall contain the proposed agenda in the notice of meeting that was issued by the first defendant (see para 6).

(2) The court was functus officio and the doctrine of res judicata would prohibit the defendants from seeking the orders sought in encl 45, not merely because the court was functus officio but also because a similar application in encl 33 had been dismissed. The matters raised in encl 45 were in any event, beyond the ambit of the original claim in the originating summons. The defendants ought to file separate proceedings in respect of the subject matter raised in encl 45. Enclosure 45 was dismissed with no order as to cost. However, the dismissal of encl 45 did not preclude the court from giving consequential directions to give effect to the terms. The court may, pursuant to its inherent powers, make consequential orders or directions to give effect to its decisions or orders, 'when its working out might involve matters on which it might be necessary to obtain a decision of the court'. The doctrine of functus officio does not take away this inherent power of the court (see paras 10–11).

(3) According to rule 5.2.4 of the Constitution, the chairman may, with the sanction of the CC, nominate not more than seven members from persons or organisations who are actively involved in Chinese education to be the nominated central committee members. The chairman would be able to do this only after he has been elected by the CC. Therefore, it was clear that the nominated central committee members do not have any role in the election of the office-bearers or the CEC. In the circumstance, subsequent to the election of the office bearers, the chairman may, with the sanction of the CC, appoint by nomination not more than seven persons to the CC. These seven nominated central committee members, however, do not have powers to appoint the CEC nor do they participate in the election of the CEC. The plaintiff would have to issue notices of meeting only to the 25 CC members who had been elected in accordance to the provisions of the Constitution, excluding the seven nominated central committee members. These are

A the CC members who would have the powers to remove, to suspend, to re-appoint or re-instate the CEC (see paras 14–15).

[Bahasa Malaysia summary

B Plaintif memfailkan saman pemula untuk menyekat dan menghalang defendan-defendan daripada memulakan mesyuarat Jawatankuasa Pusat ('CC') United Chinese School Committees' Association Malaysia ('Dong Zong') yang dijadualkan akan diadakan pada 20 Januari 2015. Plaintif menghujahkan bahawa mesyuarat oleh defendan pertama itu bercanggah dengan Perlembagaan Dong Zong dan agendanya tidak sah. Defendan belum C memfailkan afidavit balasan dan oleh itu, pihak-pihak bersetuju dengan langkah interim dan persefahaman yang membawa kepada rekod perintah persetujuan. Dengan perintah persetujuan, isu yang timbul adalah sama ada CC boleh, di bawah undang-undang membubarkan Jawatankuasa Eksekutif Pusat Dong Zong ('CEC') sedia ada dan melantik semula CEC baru sebelum D tarikh tamat tempoh empat tahun di bawah perlembagaan. Defendan-defendan mengadu bahawa plaintif gagal mematuhi terma perintah persetujuan dan dengan itu, memfailkan lampiran 33, memohon pelbagai perintah relief deklaratori dan injunksi. Lampiran 33 ditolak. Defendan memfailkan lampiran 45, memohon pelbagai perintah relief deklaratori dan E injunksi terhadap plaintif yang amat serupa dengan terma-terma yang dipohon dalam lampiran 33. Hujahan utama defendan-defendan adalah terdapat ketakpatuhan oleh plaintif pada dua perintah mahkamah ini dan dengan itu, perlu ada perintah relief deklaratori dan injunksi tambahan. Walau bagaimanapun, plaintif menghujahkan bahawa hal perkara yang terkandung F dalam lampiran 45 dan relief-relief yang dipohon di bawahnya melampaui bidang kuasa mahkamah ini atas alasan bahawa, khususnya, peruntukan-peruntukan Akta Pertubuhan 1966 memberi kuasa kepada pendaftar dan bukan mahkamah-mahkamah, doktrin res judicata akan terpakai kerana relief yang serupa seperti yang dipohon oleh G defendan-defendan dalam lampiran 33, ditolak oleh mahkamah; dan mahkamah telah functus officio kerana hal perkara dalam saman pemula telah dilupuskan.

Diputuskan:

H

(1) CEC tidak menikmati sekuriti pegangan tempoh bagi terma penuh empat tahun. Agenda yang dicadangkan dalam notis mesyuarat sah dan teratur di bawah undang-undang. Plaintif diperintahkan mengadakan mesyuarat CC dalam 21 hari perintah dikeluarkan dengan mengeluarkan I notis wajar, selaras dengan Perlembagaan Dong Zong yang mengandungi agenda yang dicadangkan dalam notis mesyuarat oleh defendan pertama (lihat perenggan 6).

(2) Mahkamah telah functus officio dan doktrin res judicata akan menghalang defendan-defendan daripada memohon perintah yang

dipohon dalam lampiran 45, bukan hanya kerana mahkamah telah functus officio tetapi kerana permohonan yang serupa dalam lampiran 33 telah ditolak. Hal perkara yang dibangkitkan dalam lampiran 45, dalam apa jua keadaan, melampaui rangkuman tuntutan asal dalam saman pemula. Defendan-defendan sewajarnya memfailkan prosiding berasingan bagi hal perkara yang berbangkit dalam lampiran 45. Lampiran 45 ditolak tanpa perintah terhadap kos. Walau bagaimanapun, penolakan lampiran 45 tidak mengecualikan mahkamah daripada mengeluarkan arahan atau perintah berbangkit untuk memberi kesan pada keputusan atau perintahnya, 'when its working out might involve matters on which it might be necessary to obtain a decision of the court'. Doktrin functus officio tidak mengetepikan kuasa inherens mahkamah (lihat perenggan 9–10).

(3) Menurut kaedah 5.2.4 Perlembagaan, pengerusi boleh, dengan kebenaran CC, melantik tidak lebih daripada tujuh orang individu atau organisasi yang terlibat secara aktif dalam pendidikan Cina untuk menjadi ahli CC yang dicalonkan. Pengerusi hanya boleh berbuat demikian selepas dilantik oleh CC. Oleh itu, jelas bahawa ahli CC yang dicalonkan tidak memainkan peranan dalam pelantikan CEC. Dalam hal keadaan ini, berikutan pelantikan CEC, pengerusi boleh, dengan kebenaran CC, melantik nominasi tidak lebih dari tujuh orang untuk CC. Walau bagaimanapun, tujuh orang ini tidak mempunyai kuasa melantik CEC kerana mereka tidak terlibat dalam pelantikan CEC. Plaintif perlu mengeluarkan notis mesyuarat kepada 25 ahli CC yang dicalonkan di bawah peruntukan Perlembagaan, tidak termasuk tujuh ahli CC yang dicalonkan. Tujuh ahli CC ini mempunyai kuasa menyingkirkan, menggantung atau melantik semula CEC (lihat perenggan 14–15).]

Notes

For cases on judgment, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7970–7972.

Legislation referred to

Societies Act 1966

Firoz Hussein bin Ahmad Jamaluddin (Muhammad Asmirul Asraf bin Fadli and Frida Krishnan with him) (The Chambers of Frida) for the plaintiff.

Justin Voon (KF Wong, HS Lim and Kho Zhen Qi with him) (KF Wong & Lee) for the defendants.

Vazeer Alam Mydin J:

[1] This is my grounds of decision for encl 45 and the consequential directions that I had given on 1 June 2015.

[2] By way of background, the plaintiff filed this originating summons on 15 January 2015 with a certificate of urgency. The plaintiffs primary aim in filing the suit was to restrain and prevent the defendants from convening a meeting of the Central Committee of the United Chinese School Committees' Association Malaysia ('Dong Zong') which was scheduled to be held at 2pm on 20 January 2015. A notice of meeting dated 6 January 2015 ('the notice of meeting') issued under the hand of the first defendant had called for that meeting. The plaintiff's contention was that the convening of the aforesaid meeting by the first defendant was in contravention of Dong Zong's Constitution, and also that the agenda for that meeting was unlawful.

[3] When parties appeared before me at 9am on 20 January 2015, it was evident that, given that the full facts were not before me, as the defendants had not filed any affidavits in reply, I could not properly adjudicate on the matter. Pending the filing and exchange of affidavits, the parties then agreed to an interim measure and understanding which led to the recording of a consent order in the following terms:

> By consent of parties the defendants agree not to proceed with the Central Committee meeting scheduled for 2.00pm on 20.1.2015, It is further agreed that the question of the lawfulness and/or validity of the proposed agenda as per the notice dated 6.1.2015 issued by the first defendant shall be decided by the court and in the event that the court were to decide that such a resolution arising form the aforesaid agenda is lawful, then the plaintiff shall convene a Central Committee meeting to discuss, deliberate and resolve the aforesaid proposed resolution as per the Notice dated 6.1.2015. The parties further agree that the members of the Central Committee and the Central Executive Committee appointed by the plaintiff shall' not be removed pending final disposal of this matter by the court.

[4] With that consent order in place, the only issue for the court's determination was the question of whether the central committee ('CC') could in law dissolve the existing central executive committee ('CEC') of Dong Zong and re-elect a new CEC before the expiry of its constitutional term of four years. The parties had agreed that if the court were to hold that the CC had such power of dissolution and re-election, then in accordance to the consent order the plaintiff was to convene a meeting of the CC to consider and resolve the motion as contained in the agenda of the notice of meeting dated 6 January 2015.

[5] Thereafter, case management directions were issued, and the parties filed

and exchanged affidavits. The parties also filed their respective written submissions. I also heard further oral arguments in open court.

[6] I had on 20 March 2015 delivered my decision on the issue at hand, wherein I had found that the CC as the appointing body also had the power to remove and re-elect the CEC. In this regard, I held that the CEC did not enjoy security of tenure for the full term of four years as contended by the plaintiff. Therefore, I held that the proposed agenda in the notice of meeting dated 6 January 2015 was valid and proper in law. As such I ordered that the plaintiff convene a meeting of the CC within 21 days of the order by issuing the appropriate notice in accordance to Dong Zong's Constitution which shall contain the proposed agenda in the notice of meeting dated 6 January 2015 that was issued by the first defendant. I have since then delivered the full grounds for that decision. The plaintiff has filed an appeal to the Court of Appeal against that decision.

[7] Thereafter, the defendants complained that the plaintiff had failed to adhere to the terms of the consent order dated 20 January 2015 and the subsequent order dated 20 March 2015. The defendants then filed encl 33 seeking various declaratory orders and injunctive relief. I had dismissed encl 33. The defendants have appealed against that dismissal to the Court of Appeal.The defendants then filed encl 45 seeking various declaratory and injunctive relief against the plaintiff, which were very similar in terms to that sought in encl 33. The defendants main argument is that there is non-compliance of these two court orders by the plaintiff, and as such the additional declaratory orders and injunctions are necessary.

[8] The plaintiff however argues that the matters contained in encl 45 and the reliefs sought therein are beyond the powers or jurisdiction of this court on the following grounds, namely that:

(a) the provisions of the Societies Act 1966 places such powers on the registrar and not the courts;

(b) the doctrine of res judicata would apply as similar relief had been sought by the defendants in an earlier application, ie encl 33, that was dismissed by the court, and which is now the subject matter of an appeal to the Court of Appeal; and

(c) the court is functus officio as the subject matter of the originating summons has been finally disposed off on 20 March 2015.

[9] I am in agreement with learned counsel for the plaintiff that with the pronouncement of the order dated 20 March 2015 the court is functus officio and that the doctrine of res judicata would prohibit the defendants from seeking the orders sought in encl 45, not merely because the court is functus

officio but also because a similar application in encl 33 had been dismissed. The matters raised in encl 45 are in any event beyond the ambit of the original claim in the originating summons. In the circumstance, I agree that the defendants ought to file separate proceedings in respect of the subject matter raised in encl 45. In the premise, I dismissed encl 45 with no order as to cost.

[10] Having done that, I must however add that the dismissal of encl 45 does not preclude the court from giving consequential directions to give effect to the terms of the orders dated 20 January 2015 and 20 March 2015. The court may, pursuant to its inherent powers, make consequential orders or directions to give effect to its decisions or orders, 'when its working out might involve matters on which it might be necessary to obtain a decision of the court' – see para 42/2/5 of *Malaysian Civil Procedure 2013*, Sweet & Maxwell Asia (2013 Ed). The doctrine of functus officio does not take away this inherent power of the court.

[11] Having looked at the evidence presented in the affidavits it did appear to me that the plaintiff had not complied with the spirit and letter of the terms of the consent order dated 20 January 2015 and the order dated 20 March 2015. In fairness to the plaintiff, it may have arisen from a misinformed reading of both the aforesaid orders and the interpretation as to who constitute the CC. To remedy this, I clarified the orders and issued further directions to the parties, for reasons that will become apparent shortly, so that there would be proper adherence to the orders.

[12] Now, having regard to the constitutional framework of Dong Zong and its structural organisation, it is clear that the CC appoints the office bearers and these officer bearers together with not more than three other members appointed by the chairman, constitute the CEC in accordance to rule 5.3.1 of Dong Zong's Constitution ('the Constitution') – The manner in which the CC is constituted is provided in rule 5.2.2 of the Constitution:

> Every Central Committee State shall nominate three (3) representatives and every Non-Central Committee State shall nominate one (1) representative to jointly constitute the Central Committee (hereinafter referred to as uthe central Committee') comprising twenty five (25) Central Committee members (hereinafter referred to as 'the Central Committee Members').

A careful reading of rule 5.2.2 of the Constitution shows that the composition of the 25 Central Committee Members is made up as follows:

(a) 18 members nominated by the Central Committee States (ie three each from the six Central Committee States); and

(b) seven members nominated by the Non-Central Committee States (ie one each from the seven Non-Central Committee States).

[13] The election of the office bearers of Dong Zong is governed by rule 5.2.3 of the Constitution, which provides that: **A**

> The Central Committee Members shall within fourteen (14) days after the Annual General Meeting of the election year, elect among themselves the following:
>
> (a) One (1) Chairman; **B**
>
> (b) One (1) Deputy Chairman;
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> (c) Five (5) Vice-chairman. The office of one (1) Vice-Chairman is reserved for the state members of Sarawak and Sabah who shall assume office in rotation; whereas the office of the other four (4) Vice-Chairman shall be reserved for the eleven (11) state members in West Malaysia to be contested in the election; **C**
>
> (d) One (1) Secretary-General;
>
> (e) Two (2) Assistant Secretary-General; **D**
>
> (f) One (1) Treasurer;
>
> (g) One (1) Assistant Treasurer.

[14] According to rule 5.2.4 of the Constitution, the chairman may, with the sanction of the CC, nominate not more than seven members from persons or organisations who are actively involved in Chinese education to be the nominated central committee members. Obviously, the chairman would be able to do this only after he has been elected by the CC. Therefore, it is clear that the nominated central committee members do not have any role in the election of the office-bearers or the CEC. In the circumstance, subsequent to the election of the office bearers, the chairman may, with the sanction of the CC, appoint by nomination not more than seven persons to the CC. These seven nominated central committee members, however, do not have powers to appoint the CEC nor do they participate in the election of the CEC. **E** **F** **G**

[15] Therefore, to give effect to the order of 20 March 2015, the plaintiff would have to issue notices of meeting only to the 25 CC members who had been elected in accordance to the provisions of the Constitution, excluding the seven nominated central committee members. These are the CC members who, in my opinion, would have the powers to remove, to suspend, to re-appoint or re-instate the CEC. However, the plaintiff had not issued the notice of meeting to all these 25 CC members. **H**

[16] Having clarified the matter of the composition of the CC, I was minded to give the plaintiff one last opportunity to give effect to the consent order of 20 January 2015 and the order dated 20 March 2015 by issuing a proper notice of meeting to the 25 elected CC members, ie those elected in accordance to rules 5.2.1 and 5.2.2 of Dong Zong's Constitution. In this regard, I ordered **I**

that the plaintiff shall within two days of first June 2015 issue a notice of meeting of the CC addressed to the aforesaid 25 CC members giving notice of meeting to be convened within 14 days of date hereof. That notice of meeting shall have only the following agenda, that is:

To discuss and accept the following Resolutions:

(a) To dissolve the 29th Dong Zong Central Executive Committee.

(b) To re-elect the positions of the 29th Dong Zong Central Executive Committee Member.

I further ordered that in the event the plaintiff fails to issue such a notice to convene the CC meeting, the first defendant as the Secretary General is to issue the aforesaid notice to the 25 CC members to convene the CC meeting comprising the 25 elected CC members to deliberate and resolve the motion as contained in the said notice which shall be:

To discuss and accept the following Resolutions:

(a) To dissolve the 29th Dong Zong Central Executive Committee.

(b) To re-elect the positions of the 29th Dong Zong Central Executive Committee Member,

[17] Thereafter, counsel for both parties sought an appointment to seek further clarification on my aforesaid directions given on 1 June 2015. Counsel appeared before me on 11 and 12 June 2015. The court was informed that the initial composition of the CC had changed as a result of resignations, removals, replacements and/or appointments made by some of the State Association Members pursuant to rules 5.2.5 and 5A.10 of the Constitution and sought the court's directions as to the actual current composition of the CC and to identify who were the CC members entitled to receive the notice of meeting and attend the aforesaid court ordered meeting.

[18] Having looked at the affidavit evidence, I found that the following changes to the CC had been done in accordance to the Constitution, namely, (a) Kelantan – removed Tan Weng Seng and replaced with Wee Pock Soon; (b) Johor – replaced Wong Toon Jui with Ooi Kiang Hong, following Wong Toon Jui's resignation; (c) Pahang – removed Gow Moor Meng and replaced with Chan Ah See; (d) Sabah – removed Chu Fui Kin and replaced with Chee Man Foh; (e) Perak – removed Lee Kon Yin and replaced with Low Tong Hooi.

[19] Therefore, I found that in addition to the 20 members of the original CC whose membership of the CC remains unchanged, the following five persons are members of the CC and are eligible to attend the CC meeting to discuss and consider agenda of the court ordered CC meeting. They are (a) Wee

Pock Soon; (b) Ooi Kiang Hong; (c) Chan Ah See; (d) Chee Man Foh; and (e) Low Tong Hooi.

[20] Orders and directions accordingly.

Order accordingly.

Reported by Afiq Mohamad